

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CHARLES L. RINDT)	
Claimant)	
V.)	
)	Docket No. 1,049,277
NATIONAL EXPRESS CORPORATION)	
Respondent)	
AND)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the July 22, 2014, Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on December 2, 2014.

APPEARANCES

John M. Ostrowski, of Topeka, Kansas, appeared for the claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant suffered personal injury by accident, arising out of and in the course of his employment with respondent and directed respondent to pay claimant's out-of-pocket medical expenses and his medical expenses incurred with healthcare providers as itemized in the parties' stipulation, subject to the statutory medical fee schedule.

Respondent argues the Award should be reversed because claimant failed to prove the accident arose out of and in the course of his employment. Additionally, respondent contends the ALJ's analysis of the injury as a neutral risk is misplaced as there is no evidence to support the accident arose out of or in the course of claimant's employment.

Claimant contends the Award should be affirmed as he was engaged in an employment related errand at the time, which put him in the location that led to his injuries.

The issue on appeal is whether claimant's accident arose out of and in the course of his employment.

Claimant is not asserting a claim for temporary total disability compensation¹ or permanent partial disability compensation. Claimant wants his medical expenses paid. Claimant has incurred \$115,949.31 in medical expenses and an additional \$210.70 in out-of-pocket expenses in connection with his care and treatment from this alleged accident.

FINDINGS OF FACT

Claimant worked for Salina Concrete before going to work for respondent. He stopped working for Salina Concrete after he fell and broke his knee in 2002. He applied and began receiving Social Security retirement after leaving Salina Concrete, and in 2008 went to work for respondent as a bus driver. He was paid by the hour and had a set schedule. Claimant was 72 years old and in his second year of employment with respondent when he was injured on December 14, 2009.

Claimant testified his day would begin at 6:00 a.m. from the bus barn, where he would leave to pick up the junior high students and deliver them to school. After a break, he would pick up the elementary students and deliver them to school. Claimant testified this process took from 6:00 a.m. to approximately 8:00 a.m. There were times when kids needed to be picked up and transferred to another school during the noon hour. Additionally, at noon or a little after, the morning kindergartners would be picked up and transported home and the afternoon kindergartners would be taken to school. Claimant worked 35 to 40 hours a week, which included some Saturdays.

On December 14, 2009, claimant completed his regular morning route and proceeded to travel to his 8:30 a.m. appointment at ComCare to obtain his medical card for his CDL. Claimant testified respondent made the appointment for him and he believed he was on the clock for the appointment and during the travel time to get there. Claimant testified that, due to time constraints, he drove the bus to his appointment. Because there was snow and ice in the parking lot he parked on the street to leave room for other patients to park in the lot. Claimant parked on Manchester Street, exited south and walked to Republic street and then west towards ComCare. Claimant had to walk in the street because there were no sidewalks and the snow was piled up in the parking lot. He agreed that the conditions he encountered were the same as the general public would have been exposed to in order to get to ComCare.

¹ The parties settled and compromised a claim for temporary total disability benefits for a lump sum payment of \$5,000.

As claimant was walking towards the parking lot and the building he remembers checking the time. The next thing he remembers is being in the emergency room at Salina Regional with the minister of his church standing beside him as he was being put on a cot to be transferred to Wesley Medical Center. Claimant doesn't remember what happened on the street near Comcare. He assumes he slipped and fell backwards on the ice. This assumption was supported a few days later when claimant found a piece of paperwork he was supposed to take with him to his ComCare appointment with blood on it. He spoke with the ambulance drivers in January 2010 to find out what happened and how he got in the ambulance and to the hospital. The ambulance crew told him they got a call to StatCare to pick claimant up. They found him in a parked car in the parking lot. Claimant was told he was found laying in the street and someone put him in their car and drove him to StatCare and an ambulance was called.

Claimant does not recall why he ended up at Wesley Medical Center, but he was there for about 10 days. He then went to Ottawa County Hospital by private vehicle for therapy. Claimant was not able to go back to Salina Regional for his therapy because they would not accept any new patients over the holidays.

Claimant testified the therapy was to help him learn to walk again. Claimant spent 10-11 days at Ottawa County Hospital. After he was released from Ottawa, claimant continued to have headaches, dizziness, backaches and loss of memory. Upon his release claimant came under the care of Dr. Woodall or Trent Davis at ComCare. Claimant testified it took a year for his symptoms to resolve. In the middle of January 2010, claimant had spasms and a blood clot in his lung and spent time in the hospital. Claimant testified the muscles in his stomach would tighten up. This would last for two hours. The cause of the spasms was never identified. Claimant continues to get occasional headaches. His memory is returning.

Claimant has not worked since the accident, but has applied with respondent to return to work. He has not received a call yet. He continues to receive Social Security retirement. Claimant testified when he first went to work for respondent he had no problems with headaches, back issues, spasms, memory loss or speech problems.

Claimant testified that after his morning route, if he were not scheduled for the noon route, he would park the bus and could go home or do anything he wanted. Then he would return for the after school pickups. Claimant was paid for driving the bus and for any classes or training he had to attend for the job. Claimant was not paid if he was not driving a route or in classes or training. Claimant testified drivers are allowed to take their buses to their residence when they are assigned to the noon route in order to stay on schedule. Drivers are not paid for the time their buses are parked at their residences, but they are paid for the travel to their residences, just as if they were driving back to the bus barn after their route. When the driver begins the next route they are considered on the clock and are paid.

Claimant testified he considered himself on the clock when he was going to ComCare because respondent set up the visit and because, when he arrived, he radioed respondent his location at the ComCare appointment. Claimant testified there are no time clocks and employees simply check off what time they arrive and what time they leave.

PRINCIPLES OF LAW AND ANALYSIS

The Kansas Supreme Court, in *Hensley*,² established three general categories of workplace risks: (1) risks distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character. The risks in the first category are universally compensable. The risks in the second category do not arise out of employment and are not compensable. However, the risks in the third or neutral category are compensable.³ The Award, citing Larson's Workers' Compensation Law, Sec. 7.04 [1][a], 7-28 to 7-29, explained the precept allowing the unexplained fall to be ruled compensable. The ruling rationalizes the particular injury would not have happened if the employee had not been engaged upon an employment errand at the time.

Here, claimant was proceeding to a medical appointment, necessitated by his job, scheduled by respondent, while being paid by respondent, to obtain a physical which would allow him to maintain his CDL and allow him to continue driving for respondent, a benefit to both claimant and respondent. Respondent contends claimant's fall, regardless of how it happened and whether claimant was on the clock, did not arise out of claimant's employment. The Supreme Court in Kansas has allowed compensation for injuries suffered while a worker is involved in some special work-related errand or special-purpose trip in the scope of employment.⁴ In this instance, claimant's trip to ComCare was for the special purpose of securing a CDL to ensure his qualification to continue driving a bus for respondent. Under *Brobst and Mendoza*, the accident arose both out of and in the course of claimant's employment with respondent.

Respondent further contends claimant's fall was unexplained and therefore not compensable. However, the Court of Appeals, in *McCready*, held that neutral risks or unexplained falls are also compensable.⁵

² *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

³ *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

⁴ *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997); See also: *Mendoza v. DCS Sanitation*, 37 Kan. App. 346, 152 P.3d 1270 (2007).

⁵ *McCready* at 92.

The Award of the ALJ granting payment of claimant's medical expenses, subject to the statutory medical fee schedule, for the treatment of injuries suffered on December 14, 2009, is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant's fall on December 14, 2009, arose out of and in the course of his employment with respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated July 22, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
johnostrowski@mcwala.com
karennewmann@mcwala.com

Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
kak@kc-lawyers.com
rce@kc-lawyers.com

Bruce E. Moore, Administrative Law Judge